## APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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NO. 8786 - MARCH TERM, 1967

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| UNITED STATES OF AMERICA, Appellant, v. ALLEN S. KRAKOVER, Trustee, Appellee. | ) | Appeal from the United States District Court for the District of Colorado |

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Florence Wagman Roisman, Attorney, Department of Justice (Barefoot Sanders, Assistant Attorney General, Lawrence M. Henry, United States Attorney, and David L. Rose, Attorney, Department of Justice, were with her on the brief) for Appellant.

Fred M. Winner of Winner, Berge, Martin and Camfield for Appellee.

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Before LEWIS, BREITENSTEIN, and HICKEY, Circuit Judges.

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BREITENSTEIN, Circuit Judge.

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The question is whether in a Chapter 13 bankruptcy proceeding[1] the United States can be ordered to pay to the trustee part of the wages of one of its employees. The referee answered the question in the affirmative and, on a petition for review, the district court agreed. This appeal followed. No jurisdictional question is raised by the parties. If an allowance of the appeal is required by § 24 of the Bankruptcy Act, 11 U.S.C. § 47, we allow the appeal because of the important question presented.

The case is before us on a skeleton record. We are not provided with the debtor's petition, the plan which he proposed, the action of the creditors thereon, or the order of confirmation. In the circumstances, we assume that they are regular and in conformity with the Act. It is conceded that at the time of the confirmation of the plan the debtor was an employee of the State of Colorado and thereafter became an employee of the mint of the United States at Denver.

On the motion of the trustee the referee ordered that:

> "* * * until the further order of the Court said employer [the United States] shall hereafter, as the wages or earnings of the debtor become due and payable, and on each pay day, and out of said wages or earnings, pay $30.00 semi-monthly to said Trustee; and the payment thereof by said employer to the Trustee shall fully acquit and discharge said employer to the extent of such payments as against the claims or demands of the debtor; * * *."

The question presented is one of first impression for federal appellate courts. The United States relies on its immunity to suit without consent and the trustee denies the applicability of that doctrine.

The referee's order was entered under § 658 (2), 11 U.S.C. § 1058(2), which provides:

> "During the period of extension the court—
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> * * *

[1]See 11 U.S.C. § 1001-1086.

(2) may issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments."

The trustee says that the reference to "any employer" in its uncompromising generality includes the United States and supports his position by reference to Baltimore National Bank v. State Tax Commissioner of Maryland, 297 U.S. 209, where the Court held that the use of the word "all" in a statute pertaining to the taxation of bank shares includes shares owned by an agency of the United States. The government counters with United States v. United Mine Workers of America, 330 U.S. 258, where the Court declined to construe the word "employer" as used in the Norris-La Guardia Act to include the United States.

In Mel's Lockers v. United States, 10 Cir. 346 F.2d 168, 170, we held that general language in the Bankruptcy Act "cannot be construed as a waiver of governmental immunity." The same rule must be applied here.

The trustee's argument that the order does not violate the principle of sovereign immunity is unconvincing. Although compliance with the order may require only another hole in a punch card and the issuance of two checks rather than one, the controlling factor is the fact of impact on the government rather than the extent of the impact. The referee has ordered the government to pay to the trustee money in the hands of its disbursing agent. This runs contrary to Buchanan v. Alexander, 45 U.S. (4 How.) 20, where the Court denied the right to attach money which was in the hands of a government disbursing agency and was due for wages earned.

If the intent of Chapter 13 is to permit the voluntary assignment of unearned wages by the submission and confirmation of a plan, and if such an arrangement is not subject to the restrictions of the Anti-Assignment Act,[2] the

[2] 31 U.S.C. § 203. In Goodman v. Niblack, 102 U.S. (12 Otto) 556, 561, the Court held that the Anti-Assignment Act did not apply to assignments for the benefit of creditors.

fact remains that no avenue is open for the referee to enforce his order against the United States because it is immune from execution and garnishment.[3] An order which may not be enforced is an exercise in futility.

Segal v. Rochelle, 382 U.S. 375, and Kolb v. Berlin, 5 Cir., 356 F.2d 269, do not help the position of the referee. In Segal the Court held that an inchoate claim for loss-carryback federal income tax refunds was property within the meaning of § 70a(5) of the Bankruptcy Act, 11 U.S.C. §110(a)(5), and that the Anti-Assignment Act did not bar the transfer of such refunds to the trustee. Kolb holds that the Anti-Assignment Act does not bar the transfer under the Bankruptcy Act of accrued but unpaid wages of a bankrupt federal employee. Each case relates to a transfer under § 70a and we have expressly left undecided the applicability of that section to Chapter 13 proceedings.[4] Whether it is applicable or not the answer to the problem here presented comes out the same. The order may not be enforced against the United States because Congress has not waived immunity of the United States to suit.

This conclusion does not deprive federal employees of the benefits of Chapter 13.[5] The compulsion required to affect the payment to the trustee of a part of the wages as earned can be exercised against the debtor by an appropriate order to endorse and turn over the pay checks. Such an order will protect the trustee and the creditors and will not infringe on the immunity of the United States.

Reversed.

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[3]Buchanan v. Alexander, 45 U.S. (4 How.) 20, and see Federal Housing Administration v. Burr, 309 U.S. 242, 250-251.

[4]See City National Bank & Trust Company v. Oliver, 10 Cir., 230 F.2d 686, 689.

[5]In Perry v. Commerce Loan Co., 383 U.S. 392, 395, the Court said that Chapter 13 gave "to the wage earner a reasonable opportunity to arrange installment payments to be made out of his future earnings" and was intended to encourage wage earners to pay their debts in full "by offering two inducements: (1) avoidance of an adjudication of bankruptcy with its attendant stigma; and, at the same time, (2) temporary freedom during the extension from garnishments, attachments and other harassments by creditors."

## APPENDIX B

### Order On Petition For Review

### No. 41938

This matter is before the Court on a Petition for Review of an Order of the Honorable Richard P. Matsch, Referee in Bankruptcy, denying motion to vacate the Referee's Order of August 11, 1965, requiring the Denver Mint, employer of the debtor, to pay over a portion of the debtor's wages or earnings to the Trustee. Petitioner on review appears by Donald P. MacDonald, Assistant United States Attorney, and the respondent on review appears pro se.

The Referee, after a full hearing, filed a Memorandum Opinion, adopting the same as Findings of Fact and Conclusions of Law, and thereupon entered an Order denying and dismissing the motion of petitioner on review to vacate the previous Order of the Referee; the Referee further determined that the Order of August 11, 1965 should remain in full force and effect.

The Referee has certified to this Court two questions for review, and the matter having come on for hearing on February 18, 1966, and the Court having heard the arguments of counsel, read the briefs filed herein, and having considered the record on petition for review, is of the opinion that both of the questions certified by the Referee should be, and the same hereby are, answered in the negative.

The facts are not in dispute and the Court is of the opinion that none of the Findings of Fact and Conclusions of Law as contained in the Referee's memorandum are clearly erroneous.

We believe that the recent case of Kolb v. Berlin, ..... F.2d ..... 5 Cir. (No. 22344, Feb. 23, 1966), Bankruptcy Law Reports ¶ 61,716 p. 71-117, decided after the Referee

determined the issues herein, gives added support to the conclusions he reached. There the Court rejected the contention of the appellant-bankrupt (a federal civil service employee) that under Section 70(a)(5) of the Bankruptcy Act his accrued wages do not pass to the trustee since the United States, as sovereign, cannot be made to respond to levy or judicial process. Cf. Segal v. Rochelle, ..... U.S. ..... (Jan. 18, 1966) 34 Law Week 4091.

It is Ordered that the Findings of Fact and Conclusions of Law found and entered by the Referee be, and the same hereby are, adopted by the Court, and that the Order of the Referee of December 29, 1965 be, and the same hereby is, approved and affirmed.

Dated at Denver, Colorado, this 31st day of March A.D. 1966.

By The Court:

Alfred A. Arraj
Chief Judge
United States District Court

Filed March 31, 1966

## APPENDIX C

### Memorandum Opinion Of Richard P. Matsch, Referee In Bankruptcy, Findings Of Fact And Conclusions Of Law And Order On Motion Of United States To Vacate Order Directed To Denver Mint.

Lawrence M. Henry, United States Attorney Donald P. MacDonald, Assistant United States Attorney, representing the United States Allen S. Krakover, Trustee

Matsch, Referee. On March 18, 1965, Lawrence Edward Anderson, a wage earner who was then employed by the State of Colorado, filed his petition for a wage earner plan pursuant to Chapter XIII of the Bankruptcy Act. The plan submitted, accepted by the creditors and confirmed by the Court, provided for the payment of $60.00 per month from this debtor's future earnings to the Trustee for the payment of debts. Mr. Allen S. Krakover was duly appointed Trustee and qualified as such. Thereafter, this wage earner changed employment and became an employee of the Denver Mint, an agency of the Department of the Treasury of the United States Government.

On August 11, 1965, upon motion of the Trustee, without notice to the wage earner or to the Denver Mint, and upon an ex parte basis, an order was entered requiring the Denver Mint to pay $30.00 semi-monthly to the Trustee herein, said payments to be made as the wages or earnings of the debtor herein become due and payable on each pay day, said payments to be made out of said wages or earnings, which order further provided that such payments shall fully acquit and discharge said employer to the extent of such payments, as against the claims or demands of the debtor.

The matter now to be determined arises upon the motion of the United States through the Department of the Treasury, Denver Mint, to vacate the above described order

and upon the arguments and briefs submitted concerning that motion.

The United States asserts that the questioned order is void because it is an action against the United States without its consent contrary to the doctrine of sovereign immunity and that it is, in effect, an attempted ancillary attachment wherein the United States is in the position of a garnishee.

The resolution of the issues presented requires a consideration of the nature of a wage earner proceeding under Chapter XIII of the Bankruptcy Act. It is first to be noted that such a proceeding can be initiated only upon a voluntary petition by a wage earner stating that the debtor desires to effect a composition or extension, or both, out of his future earnings or wages. Secs. 621-623 of the Bankruptcy Act. Under Sec. 611 of the Act, the result of such a petition is that for purposes of the Chapter XIII proceeding, the Bankruptcy Court obtains "exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages during the period of consummation of the plan." Under Sec. 646 (4), the wage earner plan must include provisions for the submission of future earnings or wages of the debtor to the supervision and control of the court for the purpose of enforcing the plan. If the plan is accepted by the creditors and confirmed by the court, its provisions are binding upon the debtor under Sec. 657. During the period of extension of the debts, the court retains jurisdiction of the debtor and his property under Sec. 658, which provides:

"Sec. 658. During the period of extension, the court —(1) shall retain jurisdiction of the debtor and his property for all purposes of the plan and its consummation and shall have supervision and control of any agreement or assignment, provided for in the plan, in respect to any future earnings or wages of the debtor; and

(2) may issue such orders as may be requisite to effec-

tuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments."

The second paragraph of this section was the jurisdictional predicate recited in the order now at issue. While the statute provides that such an order may be enforced in the same manner as a judgment, which would be a writ of execution under Rule 69 of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by General Order 37, no enforcement procedure is now before the court. The sole question for decision is the validity of the order itself.

The order does not adjudicate any issue between the Trustee and the United States or between the debtor and his employer. It provides only that as wages become due and payable, that portion of them which has been dedicated to the plan should be paid directly to the Trustee. It is merely a recognition of the legal effect of the entire statutory procedure in Chapter XIII which is, in essence, a voluntary assignment of a portion of the debtor's wages to the payment of his creditors under the plan. Since the order does not take effect by its own terms until and unless wages have been earned by the employee and are payable by the employer under the terms and conditions of the employment agreement, it does not affect the property of the United States. The case is therefore readily distinguishable from the authorities cited in the argument of the United States, (e.g. Minnesota v. United States 305 U.S. 382 (1939)) which hold that a suit against property in which the sovereign has an interest is a suit against the sovereign. In Land v. Dollar 330 U.S. 731 (1947), the Supreme Court established as a test for determining if an action were a suit against the sovereign the questions whether "the judgment sought would expend itself on the public treasury or domain or interfere with the public administration." (page 738) There is no evidence in this matter that the order

involved interferes with the operations of the Denver Mint and there is no impact on the government's funds since the money involved has already been earned and appropriated as salary.

The language of Sec. 658 makes no exception for employees of the United States. It was adopted by the Congress which has the power to subject the United States to judicial process. While consent to suits is not lightly to be implied from Congressional action, it is fair to assume that the Congress did not overlook the reality of the vast number of public employees in establishing Chapter XIII and intend one procedure for privately employed wage earners and a different one for those on the national payroll.

The contention that this order violates the well established rule that the United States as an employer is not subject to garnishment process overlooks the voluntary nature of Chapter XIII previously discussed herein. No creditor can institute the proceedings involved here. The order establishes a voluntary payroll deduction not essentially different from those commonly recognized such as hospitalization insurance, a United Fund plan, or a deduction for savings bonds.

The foregoing considered, and it is hereby adopted as findings of fact and conclusions of law, it is Ordered that the motion of the United States of America through the Department of Treasury, Denver Mint, to vacate the order of August 11, 1965, directed to the Denver Mint shall be and it is hereby denied and dismissed and the said order shall remain in full force and effect.

Done at Denver in said District this 29th day of December, 1965.

Richard P. Matsch
Referee in Bankruptcy

cc-Donald P. MacDonald Allen S. Krakover Thomas J. Dobbins Gerald Kopel Benjamin C. Hilliard, Jr. Robert P. Fullerton JJ

Filed December 29, 1965.